THE REVISED PROTOCOL IN THE DRESS AND WAIST INDUSTRY

By Julius Henry Cohen,

Author of *Law and Order in Industry* and *The Law:—Business or Profession?*

Events in the garment industries of New York take place with such rapidity and are so kaleidoscopic in shape that it is hopeless for one not himself a participant to keep them connectedly in mind. Yet these combinations and permutations, if analyzed, have very instructive value, and, properly interpreted and applied, bring great consequence to the industries of our country.

There is a very clear division in New York City between the men's and women's clothing industries. As to the men's industry—so far as this city is concerned—a very substantial part of the men's clothing industry was, up to a short while ago, working under a trade agreement between the American Clothing Manufacturers' Association and the Amalgamated Clothing Workers' Union, with an arbitral tribunal consisting of Charles L. Bernheimer, Dr. J. L. Magnes and Dr. Henry Moskowitz, as a committee of moderators. This trade agreement was recently abrogated by the employers because of the failure of the workers to observe a decision of the board of arbitration. As to the women's industry—the women's wear industry, on the workers' side, is largely represented by the International Ladies' Garment Workers' Union. The employers are divided into various groups. The manufacturers of cloaks, suits and skirts are now represented by one association, the result of a consolidation in 1915 of what had been theretofore two employers' organizations; the manufacturers of dresses and waists are represented by another association, the manufacturers of children's dresses by a third, the manufacturers of ladies' undergarments by a fourth, the embroiderers by a fifth, and the house dress and kimono manufacturers by a sixth. All these trades are now working under trade agreements with the union. It was in the cloak, suit and skirt industry, covering about 60,000 workers, that the protocol plan was first devised and kept in operation for a period, roundly, of about five years and a half. It will be recalled

that the protocol was terminated in 1915, subsequently revived by the action of the Mayor's council of conciliation, consisting of Dr. Felix Adler, Chairman, Louis D. Brandeis, Henry Bruère, George W. Kirchwey, Charles L. Bernheimer and Walter C. Noyes, and again terminated in 1916 by the union upon the charge that the manufacturers had refused to follow a decision made by the Mayor's council of conciliation. The lockout and the strike that followed are current newspaper reading. I have endeavored, in *Law and Order in Industry*, to give an impartial review of these experiences up to the time I ceased to act for the employers (August, 1915).

In the dress and waist industry recent developments bear materially upon the general movement for progress in industry Some of these developments I believe warrant immediate consideration on the part of those who would seek to secure fairness and equity in industry through processes of law and order. As the result, first of conferences between the parties and, later, awards by the board of arbitration (Hon. Julian W. Mack, Hamilton Holt[1] and Robert W. Bruère), the dress and waist protocol originally made in 1913 has been revised and readjusted to meet the experiences of the past three years.

I think Mr. Morris Hillquit (counsel for the International Ladies' Garment Workers' Union) will agree with the statement that, in many respects, this recently revised protocol, over which he and I fought in the making, is as superior to the old protocol in the cloak industry as our federal Constitution is superior to the old Articles of Confederation. Indeed, Mr. Hillquit stated in the course of the proceedings before the board of arbitration that it was his hope that the document devised through these legislative processes would become the model for all the industries with which the International Ladies' Garment Workers dealt. In view of the pioneer nature of these protocols and the unusually chaotic condition of the industries in which they have been evolved, it would be rather anomalous if experience did not develop weaknesses and necessitate new invention. If one will look at the Patent Office models showing the evolution either of the modern electric locomotive or the modern automobile—mark even the improve-

[1] Mr. Holt resigned in May, 1916, and Charles L. Bernheimer was substituted in his place.

ments of the past decade—he will appreciate why a piece of newly devised industrial machinery intended to serve the needs of a complex, highly emotional and unorganized industry, requires constant readjustment and changes to meet weaknesses revealed in practice.

There seems to be a rather current belief that there is presented to employers today a clear choice between peace and war. This is a fundamental error made by nearly all critics of the protocol. The fact is that as long as *we* live, and for a longer period still, we shall have *conflict* in industry. We shall not have *peace*. The real choice is not between peace and war, but between *conflict* and *conflict*. Or, put in another way, the question is: *How shall inevitable conflict be met so as to conserve the best interests of all parties concerned?* War carries with it incidents of physical violence, law-breaking, damage to property, peaceful or unpeaceful picketing, starvation of workers, ruination of employers, disturbance of the public peace—the general breaking down of moral restraint and discipline. Just as wasteful as war, it is the bare truth to say that in carrying the burdens of the waste, the cost falls more heavily upon the worker. Not that employers do not suffer; but the suffering cannot be so poignant. While in the ranks of employers and workers alike are always to be found men eager to shake the fist, eager to beat the head, to smash windows or to "starve 'em out," the cooler, reasoning, experienced men, who, either through personal suffering have learned their lessons, or through trained imagination understand the cost, counsel against war—*except as a last resort*. Now, obviously, both employers and workers have *rights*, and each collective group has its *policies*. As in national, state and municipal affairs, there is conflict between opposing policies and ofttimes bitter conflict between the rights of various interests in the community. We do not settle *such* conflicts by violence or by starvation. Defective as our legislative and political processes are—with all the evils connected with our present electoral machinery—we still hold fast to our faith in the parliamentary and juridical method. We sometimes wait a decade before courts modify their decisions. In the retrospect, we wonder how error is so frequent, and yet we wonder why it is not more frequent, since the human animal, with all of his infirmities of temper and intellect, is the instrument through which we operate.

Within the limits of an article such as this, it is, of course, impossible to define the scope of the general conflict. For the present, it will be enough to say that the modern employer, willy nilly, is bound to represent and express in social economy today a sturdy and justifiable movement for efficiency, economy and elimination of all waste. To secure the result he must stand for a better equipment of the workers and a better discipline in the shop. "Shop organization" is the key to shop efficiency. The direction of the shop organization, the maintenance of discipline, and the selection of men upon the basis of efficiency are essential conditions of the progress of industry. This, of course, does not mean that he should ignore "the human rights of the worker."

On the workers' side, we find—whether we like it or not—they have determined, as they have the right to determine, that the regulation of wages and conditions of labor shall no longer be treated as a matter of individual bargaining. The trades union is here and here to stay. It represents something that has an inherently sound basis—whatever sound criticism from time to time may be made either of its acts or its policies. The trades union is the workers' "attorney in fact"; it presents in organized fashion what the workers believe to be their due. It would be an anomalous situation if such organizations did not often ask for more than they were entitled to, or more than the particular industry could stand at the moment of their asking. Here, then, is *conflict*—conflict similar in many respects to the conflict over definite pieces of legislation at Albany or Washington. How shall it be handled? By processes of reason, by analysis of the facts involved, by application of sound economic principles?

But behind all of the specific proposals we must admit that there is something more—there is a movement for the greater democratization of industry, the effort to control, or, if need be, to destroy the heretofore existing autocratic government of the employer in industry. It is, indeed, the consciousness of this movement on both sides that brings the real clash. Mr. Rockefeller was made aware of it. With the aid of Mackenzie King, he has earnestly endeavored, I believe, to meet it in his *New Industrial Republic*. Let us make no mistake. We are dealing with tremendous social forces—*the inevitable movement for industrial discipline and efficiency coming up one avenue and the equally inevitable move-*

ment for industrial democracy coming up another. The two should not clash; they are not inherently antagonistic to each other; but the effort of each to press forward its particular claims or application at the moment brings conflict. In this conflict each side takes its stand and fights. But how fight? With fists, with clubs or hunger as the weapons? Starvation versus violence? This is not the American way of meeting great issues. It goes against our grain to settle such conflicts with the gun or the bludgeon. It makes law and order a synonym for oppression, rather than for fair play.

On the other hand, the appeal to arbitration comes sometimes from employers and sometimes from workers, as the refusal to arbitrate comes sometimes from one and sometimes from the other. In 1894 the country is plunged into industrial war. Then the railroad managers refuse to arbitrate. In 1916 the railroad managers plead for "the sacred principle of arbitration in industrial disputes." Now the men refuse. In 1916 the president of a street railway system and an entire organization of manufacturers refuse to arbitrate, and in both instances the workers plead eagerly for "the sacred right of arbitration." How comes it that the refusal to submit industrial controversy to impartial review comes sometimes from the employers and sometimes from the workers? And why is it that society itself, refusing in this day to permit men to settle private controversy by private war, still suffers lynch law to reign in the field of industrial disputes? Is industrial controversy, involving large masses of people, disturbing whole communities, bringing starvation or bankruptcy or both in its train—is it a private matter—when even the laundress, if she is refused her pay, may not take her 60 cents from her mistress's pocketbook, but must go to court and sue? Let men be right as heaven itself, who shall be permitted by coercion to win his way, to trample over neutrals, to hack his way through to the goal of his wishes? We allowed capital to do it. For a while we gave it free rein, until it became unbearable—then society found a way to curb capital. We let the nations do it, yet now we earnestly believe that a way will soon be found to curb even the nations. How soon shall we say to *both* capital and labor: "Neither of you shall coerce the other by force of your power. Justice, not might, shall determine this controversy between you."

Why has the judicial method for settlement of industrial disputes found such opposition?

There are two important reasons among many. The railway men say:

"Yes, we went to arbitration, and got beaten. The impartial arbitrator showed he had the capitalistic bias."

The cloak manufacturers say:

"The arbitrators are uplifters. They always sympathize with the men. They give us the worst end of it."

We must not delude ourselves. Men have had their fingers burned at the furnace of arbitration. There is no quarrel with the courts when the judges are free from bias, go into all the evidence, courageously decide the issues and decide them right; but when judges are biased, are inefficient, lack courage or understanding, then the country demands "recall of judicial decisions" or "recall of judges," until, awakening to the real trouble, we find the right men, put them in the right places, and secure a renewal of confidence in judicial machinery. Even then judicial error multiplies. The latest volume of Appellate Court Reports discloses how judicial error creeps into the very best and unbiased of judicial intellects. Do we, then, prefer anarchy or Lynch law? No; we take the judicial method as we take matrimony—for better or for worse. But there is another reason for the refusal to arbitrate, much more fundamental and much more difficult to correct. It is the "balance of power" theory applied to industrial affairs. Nearly all of the old writers on collective bargaining approved of it on the theory of checking abuse of power by employers by the organization of the workers, and vice versa. A strong employers' organization will curb a strong union from abusing its powers, just as a strong union will curb the employers. The theory resembles the "balance of power" theory in international affairs, whose futility as a means of protection to neutral or weak powers is now graphically demonstrated. The truth is that in industrial affairs, as in international affairs, the "balance of power" theory is good when you hold the balance. When the other fellow holds the balance it is all wrong. Now, balance the power of the strike with the power to discharge—how comfortable for the employer if there is a large surplus of labor; how comfortable for the workers when there is a large shortage of labor! No more empty weapon of

defense can be given to an employer than the right of discharge in the height of the season when he cannot get help and the customers are clamoring for their goods. In Bridgeport the Remington munitions works take all the men who go on strike elsewhere. What power is the right to discharge in such a time? When the scale turns and there is shortage of work again, then the power of the strike becomes an empty weapon for the workers.

When power is asserted to coerce acceptance of one side's view, it prevails only for the time being. Napoleon prevailed until all Europe turned. The Kaiser got almost to Paris before weakness could gather up her skirts and bring new power to her side. Schrecklichkeit has its day and then it gets the day after. And "the day after" arrives sooner now than it did in Napoleon's time. New powers unthought of are released to punish the offender. It is a simple psychological law that decision produced by coercion begets rancor, hatred and release of new powers of coercion; the defeated party retires only to hit the other fellow a crack when he finds him a little groggy on his legs. So industrial warfare goes on and on and on—action and reaction—until each side is driven to "quits," solely because of exhaustion. Thus, while we put the emphasis on the necessity for avoiding waste in industry, we resort to the most wasteful process for adjusting industrial controversy.

The protocol method, in its final analysis, is merely a human effort, earnest though imperfect, to apply to inevitable conflict in the industrial field the modern processes of reason, to borrow from constitutional government, from legislation, from jurisprudence, from social economics, from business, from everywhere, the best that human brain has yet evolved to establish a more orderly and less wasteful method for meeting such crises and concrete issues as they emerge from below. For want of a better method we adopt what we are pleased to call the legislative and juridical.[2] The choice for the employer and the worker, too, therefore, is not a choice between *peace* and *war*, but a choice between *conflict on the plane of the savage* and *conflict on the plane*

[2] See in this connection the following recent articles: *The Development of Government in Industry*, by Earl Dean Howard; Editorial Note: "A New Field for Systematic Justice," by John H. Wigmore, *Illinois Law Review*, March, 1916; "The Need for Industrial Jurisprudence," by Walston Chubb, *The Standard*, March, 1916.

of the civilized man. The latter plan, of course, involves honorable, rational, fair dealing—effort to agree where agreement is possible, frank agreement to disagree where agreement is impossible, and the application of the process to the disposition of disagreement. Imperfect as we know these processes to be, we know they are better and less wasteful then the processes of the savage. Who is satisfied with the work of state legislatures or of Congress or of municipal government generally, or even with the courts? We are just a little bit farther away from darkness, that is all. The choice is between something *worse* and something *better*, not between something *wholly good* and something *wholly bad.* It is a curious thing that business men, who are most ready to avert a lawsuit by compromise or commercial arbitration, are often the first in their labor disputes to insist upon a fight. They fail to judge by putting side by side one set of conditions with another. There is no panacea yet invented to cure these "labor troubles." They are *labor troubles* in another sense; they precede the birth of new ideas.

The revised protocol in the dress and waist industry will justify scrutiny because it is a recent effort to meet industrial difficulties with resourceful invention. It is more than a renewal of amicable relations now having a three years' background. It is a re-statement, a re-application of principles, a renewal of effort to make the statement of these principles more definite and their application more workable in practice. Within the limits of this article it will not be possible to give a full résumé of the provisions of this document.[3] But several points of general interest may be considered now.

First of all, upon the efficiency and economy side, the revised protocol recognizes clearly that, for the present at least, the selection of workers, the assignment of work, the organization of the factory and the determination of all administrative problems must be left with the employer. It is the abuse of this power, where it results oppressively to the individual worker, that furnishes the basis for complaint. The new statement is contained in the following:

> The employer is entirely free to select his employes at his discretion, free to discharge the incompetent, the insubordinate, the inefficient, those unsuited

[3] Copies will be available presently for all those who are interested.

to the work in the shop, those subversive of order and harmony in the shop and those unfaithful to their obligations. He is free, in good faith, to reorganize his shop whenever, in his judgment, the conditions of business should make it necessary for him to do so, and he is free to assign work requiring a superior or special kind of skill to those employes who possess the requisite skill.

In the next place, there is a new treatment of the matter of shop strikes. There is probably nothing which is so irritating to employers as to find that protocol inhibition of shop strikes is not effective as an insurance policy. Employers expect in joining an employers' association under agreement with the union to secure insurance coverage against strikes. Shop strikes are not always official strikes. In reality, they are more often shop *mutinies*. To attack this disease has occupied the time and attention of association and union officials for several years. The recent award of the board of arbitration in the dress and waist industry made after weeks of debate and consideration is the most forward step ever taken, so far as I know, in any collective agreement either in this country or abroad. This new award provides that:

If in the case of a shop strike, the union shall order the workers to return to work and if they shall fail to obey such order, *they shall forfeit all rights under this protocol* and shall in addition be subject to punishment by the union to be reported promptly to the association.[4]

If a chief clerk or a deputy or other officer of the union or association shall condone or connive at a shop strike or a shop lockout *or fail to perform his duty in respect thereto*, the organization whose member is affected adversely thereby shall have the right to complain to the other organization and ask for the punishment or removal of such officer. The failure of such organization to act promptly and fairly on such complaint shall constitute a grievance to be presented to the board of arbitration. The board shall have power to direct that organization to take such disciplinary measures against such chief clerk, deputy or officer, including fine, suspension and removal from office, as such board may deem proper.

If either organization shall fail to carry out any of the duties required under this agreement to be performed by the organization as such, the other organization may present such failure to the board of arbitration as a grievance, and the board of arbitration shall have power to impose such fine, as in the judgment of the board shall seem just or necessary in the premises; the fine to be paid into the treasury of the board of protocol standards.

A willful neglect or refusal to comply with a decision of the committee on immediate action or of the board of arbitration by a member of either organization shall have the effect of depriving such member of any of his rights under the protocol.

[4] Similar provision operates against the employer in case of a lockout.

I asked the board of arbitration, on behalf of the employers, for the following provision:

> If the chief clerk or any deputy shall fail to perform his duty under this article, or if any officer of the union shall authorize a shop strike, the union will make good all pecuniary damage suffered by the employer in consequence thereof.

The board declined to give the employers a remedy by way of damages. Instead it first established a system of penalties, and next, defined the duties of the parties in dealing with shop strikes or lockouts. The board makes it clear that an official of either organization guilty of violating the protocol is to be disciplined upon the finding of the board of arbitration.

I am not prepared to say that this is as perfect a legislative provision as can be devised to meet this evil, but it marks one advance. It clearly accepts the principle of organization and official responsibility. It definitely fixes the duty of the officers of each organization to preserve order and enforce the law of the parties' own making, and it vests in the final tribunal complete powers of discipline. When the import of these provisions is fully realized by those who are affected, I am satisfied that they will minimize, if not wholly eradicate, shop strikes.

Next in order of importance to employers is the competitive effect of a protocol arrangement. The union has never failed to admit the necessity for enforcing upon non-association employers the same conditions of labor as are agreed upon with the association. The difficulty of making good in the past has come from the absence of available machinery for enforcing standards against non-association employers. In the non-association shop the worker and the employer could, by private agreement, waive standards, though on paper the contract with the union would require the same standards as those provided in the protocol.

The attempted solution of this difficult problem in the revised agreement in the dress and waist industry is the creation of the *board of protocol standards*. This board is made up of nine persons, three representing the association, three representing the union and three representing the public. It has no power to *make* standards. On the other hand, it is given comprehensive power to investigate regularly throughout the entire industry and to enforce standards to the full extent of the power of both organizations. It is likewise given broad power to settle controversies relating

to the application of standards already agreed upon. The scheme of its organization has been borrowed from the scheme of the joint board of sanitary control—the board which has done such effective work in elevating and enforcing standards of sanitation and safety throughout New York City in both the cloak and suit and dress and waist industries, and is now practically engaged in rebuilding and relocating the entire factory district of the city. The union is required to file with the board of protocol standards copies of all agreements it makes with non-association employers. Each of these agreements contains a provision authorizing inspection of the shop and examination of the books of account of the employer for the purpose of determining whether or not the standards agreed upon are actually enforced. There is thus provided full opportunity for impartial investigation into the facts in the case of the non-association employer as well as in the case of the association employer.

One result of the adoption of this principle has already taken place. The board of arbitration made awards advancing the minima standards of wages and reducing the maxima standards of hours of labor and of overtime, and the union agreed to enforce these awards in all their dealings with non-association employers. Later on, the union filed with the board of arbitration and submitted to the inspection of the association all of the contracts it had made with such employers. Examination of these contracts revealed exemptions and modifications sufficient to justify complaint upon the part of the association that many of the awards made by the board of arbitration had in fact been ignored in the dealings with non-association employers. Upon presentation of this evidence, the board of arbitration modified and revoked its previous awards, adopting the principle that the conditions in the association employers' shops were to be no more onerous than those imposed upon non-association employers. Stripping the situation of its technical features this means, broadly, that the board of arbitration, when presented with the facts, accepts as a guiding principle that greater burdens are not to be imposed upon members of the association than the union can enforce against non-association competitors.

As this new piece of industrial legislation is being put into operation, it has already revealed imperfections; one point—the expensiveness of its operation—has already become apparent.

But may we not record the hopeful reflection that it marks a distinct advance in applying analysis and ingenuity to a most troublesome industrial problem?

There is in the needleworking industries another sore spot making for acute and difficult situations. That is, the method of settlement of piece prices. Piece prices in the dress and waist, as well as the cloak and suit industry are settled by the process of haggling, the workers in the shop represented by their price committee, the employer acting either personally or through the foreman or superintendent. There are no fixed standards of prices to govern, and delay in the settlement of prices makes not only for friction, but for great waste. The protocol of 1913 in the dress and waist industry took a step forward. While in the cloak industry the process of not working upon "unsettled garments" continues to this day, in the 1913 dress and waist protocol it was provided that work *should not be stopped,* but garments should be made with the provision that when the prices were settled, they operated retroactively. In the cloak and suit industry, until the award of the council of conciliation in July of 1915, there was *no base rate* upon which the piece rate might be estimated. In the 1913 dress and waist protocol a base rate was fixed; that is to say, thirty cents an hour was fixed as the base, which, multiplied by the estimate of the number of hours it would take an average skilled operator to make the garment, would make the piece price on the garment. This base rate was determined upon the theory of the average skilled operator, and covered a continuous hour of work. In other words, it was assumed that an average skilled operator should make thirty cents for each continuous hour of work; that, therefore, the more skilled operator would earn more than thirty cents an hour, and the less skilled would earn less. Assuming that a garment would take five hours to make, the piece rate would be $1.50. The worker who could make it in four hours would get $1.50 for four hours' work, and the worker who took six hours would get $1.50 for six hours' work. But how were you to determine in advance how many hours it would take the average skilled worker to make the garment? There was the rub. It presented and still presents a most difficult technical problem to solve. In 1913 the solution accepted was the *shop test.* Employer and worker each selected one person of average skill to test out the garment,

and upon the basis of such a test the number of hours was fixed, multiplied by thirty cents, and thus established the piece rate. Actual experience demonstrated that the *shop test* was not a practicable or fair test; it produced conflict and friction, and both sides sought a new and better method. The revision of the dress and waist protocol presents now the plan or scheme of the *test shop*. The *test shop* is a place where tests are to be made under impartial supervision, the shop being managed by representatives of both the association and the union. *The controversy is thus taken away from the shop, where it causes friction, to a place where it is to be settled impartially by people not connected with or interested in the shop.* It is too early yet to report upon this experiment.

Still more important is the application of the "log" or "part system" to the fixing of prices. In the *Report on Collective Agreements between Employers and Workpeople in the United Kingdom* issued in 1910 will be found numerous illustrations of what is known as the "log system," wherein the mechanical operation is split up into parts and a definite estimate of time fixed for each part. These standards, applied to each job, fix the piece rate. In the dress and waist industry, it had been found practicable, for the purpose of fixing piece rates, to divide the garment into parts. The board of arbitration has now determined that this system shall be applied *throughout* the industry, so far as it can be made workable. The importance of this change in reducing the haggling process to a minimum cannot be overestimated. When the price committee and the employer come now to negotiate, controversy will be narrowed down to one particular part of the garment, and this particular part, if still in controversy and unsettled, will be submitted to the *test shop*. I do not believe anyone has any hope of complete standardization of piece rates in the industry. The variations in each factory are so great, the differences in shop efficiency so manifold, that the same rate could not be applied to the same garment in every shop. The method and processes of manufacture and the condition of operation must be taken into account. But, as the result of this innovation, certain processes will be standardized for the purpose of fixing piece rates.

There remains neither time nor space to consider other features of the new protocol, such as the registration and regulation of apprentices throughout the industry, the pay for overtime work,

for piece workers, the awards of increases, the change in holidays, the limitations of overtime, the equal distribution of work, the registration of outside shops, or the rules defining the "preferential union" shop. These matters must be treated separately and upon another occasion.

The big problems confronting both parties, however, have found here new formulations and new remedies. These big problems, as I have stated them, relate to:

(a) Efficiency in the shop
(b) Discipline in the shop
(c) The repression of shop strikes
(d) The elimination of unfair competition
(e) The less wasteful method of settlement of piece rates

The revised protocol in the dress and waist industry will justify careful study by all who are interested in the *rational* method of solving industrial difficulties arising from day to day in concededly one of the most complex of complex industries. Whether or not the methods are perfect, time only will tell. It does, however, represent an honest, earnest effort to solve highly difficult industrial problems. Of one thing we can be certain. These new methods are less wasteful than the methods of anarchy and lawlessness, however defective they may prove to be in the light of actual experience.